LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 6 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 936

SOUND STEAMSHIP LINES, INC.,

Petitioner,

—against—

CHARLES GARDNER,

Respondent.

RESPONDENT'S BRIEF

LOUIS J. MERRELL
11 West 42nd Street
New York 36, N. Y.
Counsel for Respondent

SIDNEY M. WITTNER, Esq.
11 West 42nd Street
New York 36, N. Y.
of Counsel

INDEX

	PAGE
Preliminary Statement	1
Opinion of the Courts Below	2
There is no basis for review; no substantial question for review is stated; no conflict with the decisions of other courts of appeal or with this Court is claimed; the case does not present any new or novel questions of law nor is it a departure from the accepted and usual course of judicial proceedings	2
Petitioner incorporates matter that is foreign to the issue; that was not before the courts below; and is not properly before this Court	3
The Facts	4
Some of Petitioner's Grounds for Review Considered	10
Conclusion	14

Table of Cases

Hastorf v. R. F. Long, 239 F. 852	3

Supreme Court of the United States

October Term, 1957

No. 936

SOUND STEAMSHIP LINES, INC.,

Petitioner,

—against—

CHARLES GARDNER,

Respondent.

RESPONDENT'S BRIEF

Preliminary Statement

Petitioner applies for a Writ of Certiorari to review a judgment of the Court of Appeals for the Third Circuit which affirmed a judgment entered after trial before District Judge Thomas F. Meaney of the United States District Court for the District of New Jersey.

The action was in Admiralty and involves a libel filed by respondent which stated two causes of action (1) for the value of equipment delivered to the vessel "Calvert" owned by the petitioner, and (2) for a breach of an agreement to charter the vessel.

It was conceded that the equipment was delivered to the vessel with petitioner's knowledge and consent; that it was used and retained by petitioner and was still in petitioner's possession, or what was left of it, at the time of the trial some five years after delivery.

The charter party was entered into between respondent and Mr. Fuchs, an officer and the sole stockholder of the petitioner who acted on its behalf. Petitioner seems to question whether the agreement was consummated. This is not the position petitioner took at the trial. At the trial petitioner contended that an agreement had been consummated, but its officer, Fuchs, gave a different version of the agreement. His version was unsupported and was contradicted by eleven witnesses, by the documentary proof, and by his own previously sworn testimony. He was completely discredited and his testimony was rejected by the trial court.

The damages, too, were fully and completely established by competent proof. There is, therefore, only a question of fact involved. The evidence was fully discussed and analyzed both by the District Judge and by the Court of Appeals. Such questions of law as were involved are well settled, and are fully discussed in the opinion both of the Court of Appeals and the District Judge.

Opinion of the Courts Below

The opinion of the Court of Appeals is printed as Appendix A to petitioner's brief. The opinion of the District Judge, consisting of the Findings of Fact and Conclusions of Law, is not printed in the petitioner's appendix but is incorporated in the opinion of the Court of Appeals.

There is no basis for review; no substantial question for review is stated; no conflict with the decisions of other courts of appeal or with this Court is claimed; the case does not present any new or novel questions of law nor is it a departure from the accepted and usual course of judicial proceedings.

Petitioner attempts to create a question for review by stating that the interpretation of a statute (46 USC Sec.

186) is involved. The statute merely provides that the charterer is "the owner of such vessel," in cases where he is required to operate the vessel at his own expense. In such cases he becomes "the owner *pro hac vice*" (*Hastorf* v. *R. F. Long*, 239 F. 852). The purpose of the statute is to protect suppliers who extend credit to the charterer while the vessel is in his possession. It has nothing whatsoever to do with the rights and obligations between the charterer and the owner of the vessel. This statute is not involved in this litigation and its meaning is well known and well settled.

Petitioner further attempts to present a question for review by stating at page 2 that there was a "radical departure" from established Admiralty Practice. In making this statement petitioner assumes that the courts below held mere "incomplete" conversations to constitute a contract and presents the question whether "oral conversations constitute a charter party." That, of course, is too elementary a proposition to present to this court, or for that matter to any court. Such a holding, if made, would indeed be a "radical departure." However, respondent's proof—fully corroborated and substantiated in every detail—established a completed agreement and the District Court and the Court of Appeals so found.

Petitioner incorporates matter that is foreign to the issue; that was not before the courts below; and is not properly before this Court.

Petitioner at page 4 incorporates an agreement purporting to have been entered into between the Meseck Steamboat Co. Inc. and a company known as "Atlantic Highlands Pier Co." for the chartering of a vessel known as the "Americana." This agreement was not presented to the

courts below and is foreign to the cause herein. We do not even know who the Atlantic Highlands Pier Co. Inc., is.

We do know that after petitioner withdrew the "Calvert" from respondent, in breach of its agreement, the respondent tried to find another vessel that would take the place of the "Calvert," and approached, among others, the Meseck Steamboat Co., Inc. for the charter of the "Americana" but that Meseck made the agreement directly with the Monmouth Park Jockey Club, the owner of the race track. The terms of that agreement, however, have no bearing whatever upon the terms of the agreement between petitioner and respondent.

Petitioner also incorporates as Appendix C various excerpts from agreements used by the United States for chartering government owned vessels. That, of course, is also foreign to the issue and has nothing whatever to do with the case at bar.

Since only factual questions are presented by the record, it would hardly be necessary to review the evidence, especially since it was so fully considered and analyzed in the opinion of the Court of Appeals. However, it may not be amiss at this point to give a brief resume of the facts fully annotated with references to the record.

The Facts

Respondent-Libellant had been in active operation of excursion vessels for many years. Some four years preceding the contract in suit libellant was the President of Sandy Hook Inc. and the active operator of the "M/V Sandy Hook" which was engaged, in addition to running private charters, in a well-advertised run between New York and Atlantic Highlands, New Jersey, which is the terminus of

the race track operated by the Monmouth Park Jockey Club (237-238a; 410a).*

In the spring of 1951 the "Sandy Hook" was disabled as a result of a hurricane and libellant was looking for a boat to fill the vacuum. He found available the "M/V Calvert." It was owned by the respondent corporation of which Mr. Fuchs was the sole stockholder, officer, director, operator, and sole person in control.

Libellant met Fuchs on July 2, 1951 at the Bethlehem Shipyard in Staten Island where the "Calvert" was then berthed and negotiated for the chartering of the said vessel (210-214a; 219a).

Respondent explained that he was anxious to get started quickly because the race track season had opened and he wanted to cash-in on the track business; that he had the cooperation of the Monmouth Park Jockey Club who were also anxious to see that their patrons had an easy means of transportation to the track (210a).

Mr. Fuchs was then engaged in readying his vessel for excursion purposes and had made application to the Coast Guard for a certificate for 1300 passengers (Coast Guard Inspector's Book, Exh. 5, pp. 4-6). Fuchs was short some life preservers, chairs and other equipment which he needed to qualify for the Coast Guard certificate and asked libellant if he could supply them (211-215a).

On July 5, 1951 negotiations between Respondent and Fuchs were consummated in an oral agreement. Fuchs agreed to charter the vessel to Gardner up to and including Labor Day at $400 a day, with a down payment of $5,000. Gardner was to supply insurance, operate the vessel at his

---

*The references, designated by a small (a), unless otherwise indicated, are to the petitioner's appendix submitted to the Court of Appeals. The references designated by SM refer to the stenographer's minutes.

own expense and supply his own crew, except for the Chief Engineer who was to be selected by Fuchs. Fuchs was to obtain the Coast Guard certificate (209-214a; 219-220a; 230a; 236a; 267a; 313-319a; 359a).

The charter was to become effective as soon as Fuchs obtained the Coast Guard certificate (213a; 267a; 313-319a) which was ready for issuance except for the delivery of the missing equipment and some minor items, including proof of Fuchs's ownership of the vessel which was required by the Coast Guard (Exh. 5, p. 70).

To expedite the inspection by the Coast Guard, Fuchs agreed to buy from libellant the equipment he needed for the Coast Guard certificate (216-217a; 223-231a; 307-309a). On July 8, libellant delivered the equipment to the Calvert and, at Fuchs's request, put his crew aboard except for the Chief Engineer, who, as stated, was to be selected by Fuchs (150-155a; 193a; 260-261a; 221-226a; 282a). The Coast Guard inspector arrived the next day, July 9th, but the inspection was not completed because of a minor accident in the course of the boat drill, namely, the bending of a davit which, however, was repaired the same day, and because of Fuchs's failure to supply some missing details. Fuchs also failed to produce for inspection by the Coast Guard the ship's papers or an abstract thereof which was required to prove his ownership (328-329a; Coast Guard Book, Exh. 5, pp. 69-70).

The inspection was to be completed the next day, July 10th but Fuchs failed to supply the missing details. He failed to submit the ship's papers. He failed to proceed with the inspection. He failed to get the Coast Guard certificate and he failed to select a Chief Engineer (121a, 204a, Exh. 5, p. 70). When Gardner arrived that afternoon, prepared to make the down payment and take over the vessel (230a; 352-353a; 109a), Fuchs informed him that he

was sick, that he did not want to go through with the deal and that he had already ordered the towing company to remove the vessel from the Bethlehem Shipyard to Perth Amboy where he would tie her up (228a, 417a). Respondent demanded performance of the contract and demanded payment for the equipment but Fuchs said "sue me." Respondent, Gardner, testified (228a):

"Q. All right. Tell us the talk you had with Fuchs on Tuesday or Wednesday. That would be the 10th or 11th, wouldn't it? A. That's right. After talking to the captain I asked Mr. Fuchs, I said 'When do you think you will have your certificate of inspection?' and he told me at that time that he was not going to go through with the deal, that he was sick, and that his wife had asked him to get away from the boats for the season, and that he was taking the boat out of the yard, that he was not going to run the boat that season at all. And I pointed out to him that he had made a deal with me and that we had this agreement in effect and that the boat was all ready except to get her final certificate, my crew was on there, the run was made to order; and he said 'I'm sorry, I'm not going to go through with this deal at all.'

"And of course we, both of us, may have got a little demonstrative. I admit I did. There was a lot at stake as far as I was concerned. And he told me in the final analysis to get the crew, myself, the hell off the boat that day. He said he's a very nervous man and he is moving his boat. And I asked him 'Do you want to pay for this equipment today? Do you want to pay for it now?'

"He says, 'No, I'm moving the boat, I'm moving the equipment. It will be down in Perth Amboy on the boat; and if you want to collect for it, you can sue me for it.'"

This was corroborated by Lohman (SM pp. 405-6) and by Captain Jenks (SM p. 367).

At the trial Fuchs denied that he was the guilty party to the breach. He insisted that he did not order the vessel to be moved until after his meeting with respondent on July 10th at which he claimed respondent refused to go ahead with the deal (201a). That Fuchs testified falsely and that he had planned the breach before his meeting with libellant, was conclusively established by the records of the Tice Towing Company, which showed that Fuchs had, in fact, ordered the vessel to be towed from the Bethlehem Shipyards to Perth Amboy before his meeting with respondent on the 10th. (Deposition of John H. Carroll, Vice-Pres. of Tice Towing Co. and Exhibit attached thereto.)

It also appeared that the reason Fuchs gave for his breach was not true. Instead of withdrawing by reason of illness, he contacted counsel for the race track and tried to make a deal "directly" with the track behind libellant's back and cash-in for himself on the expected profits (Mermelstein counsel for the track, SM p. 91). This was admitted by Fuchs himself who testified (193a):

> "I told him (Mermelstein) that the quickest way to get on the run was to sign a charter party for the racing association."

Far from being sick at the time of the breach, as he claimed, Fuchs was seen moving libellant's material from the "Calvert" to the New Bedford, another vessel owned by him, and which he currently used in his excursion business, promptly upon the arrival of the "Calvert" at Perth Amboy (Lohman, SM pp. 407-410).

In Fuchs's own admission in his examination before trial some of Gardner's equipment was still aboard the New

Bedford, two and a half years later, viz., December 2, 1953, the date of his deposition.

At the trial Fuchs tried to change this testimony. He said the equipment he referred to in his examination before trial was not the material he purchased from respondent but new material he purchased expressly for his other vessels (102, 736). The falsity of his claim appeared from his testimony on cross-examination (197a):

"Q. Now at the time of the examination you testified that the chairs were still on the New Bedford. A. They were, the new chairs that I took over from the Calvert.

The Court: Were any of the chairs that Gardner brought on the Calvert moved to the Bedford—

The Witness: Not that I know of.

Q. Then let me read to you some more from page 52:

'Question. Did you ever return that equipment that Gardner put on Board?

'He never came for it.

'Question: Did you return it, is the question?'

The Court: You have read that already.

Q. Page 58 then:

'Mr. Wittner: Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

'The Witness: You can put somebody aboard to take it off.

'Mr. Dunham: Why the New Bedford?

'The Witness: The chairs are on the New Bedford.'

Q. Do you remember that testimony, Mr. Fuchs? A. Yes, I was referring to the new chairs.

The Court: Well, they couldn't take the new chairs off, could they?

The Witness: I didn't know what he was going to inspect, your Honor.

The Court: Well you said 'you can put somebody aboard to take it off.'

The Witness: That's right; aboard the Calvert.

The Court: No, you said—'Can we send somebody aboard the New Bedford and the Calvert, to inspect the equipment today?

'You can put somebody aboard to take it off.

'Why the New Bedford?

'The Chairs are on the New Bedford.'"

A later inspection of the Calvert in December 1954 showed that there was very little of respondent's equipment on board and what was there was so completely dilapidated as to be beyond redemption (Gardner, 420a; Wilson, SM p. 633).

As a result of the breach respondent lost, not only the business for that season but the race track made arrangements for the use of another vessel and respondent permanently lost the race track business and other business on the run which he had developed over the preceding few years.

Some of Petitioner's Grounds for Review Considered

Petitioner, for its version of the facts, adopts Fuchs's testimony and departs even from that testimony.* Since Fuchs's testimony was discredited and rejected by the trial

* Petitioner fails to refer to the record by page number as required by Rules 23 and 40 of the Rules of this Court.

court it cannot form a basis for review by this court. We will, however, refer to a few of the statements which petitioner conceives to be important reasons why a review should be granted.

1) Petitioner states that the case is important to the Maritime Industry because the decision is a departure from "statutory requirements for the chartering of a vessel."

As already pointed out there is no departure from statutory or decisional law or from customs or practice. This case involves purely a claim for damages for breach of contract. It does not involve and is of no interest to the Maritime Industry.

2) Petitioner states that both the District Court and the Court of Appeals "misunderstood" the importance of a performance bond and by failing specifically to mention the performance bond in the decision implied "that these provisions are unnecessary." This is both an assumption and a *non sequitur*.

The question of the performance bond was fully litigated at the trial and the proof showed that the parties agreed to do without a bond. At first, Fuchs did ask for a bond stating that he had installed a new Diesel engine and wanted to be protected against damage to it by an incompetent engineer. Respondent consulted with his insurance broker and was informed that the hull and machinery insurance covered the engine for all damages except for possible mishandling by the engineer. To relieve Fuchs of any concern on this point it was suggested that Fuchs be permitted to select his own engineer (289a-290a). Respondent submitted this suggestion to Fuchs who readily agreed to eliminate the bond and hire his own engineer although his salary would still be paid by respondent. Respondent testified (221a):

"And Mr. Fuchs says 'yes, that's an excellent idea. I would be glad to put my own engineer on the Calvert.'

"And I said 'By all means put him on and I will pay him his salary at the prevailing rate.'

"And that was agreed.

"I said 'Then it is understood that we have nothing further to do about performance bonds, Mr. Fuchs,' and he said 'That's all right. I'll put my engineer on. I'm satisfied.'"

Petitioner now intimates the trial court overlooked the question of the bond. The record shows that the court was keenly aware of the question and petitioner acknowledged it (291a):

"The Court: My recollection of the testimony is that Fuchs suggested a performance bond because of the fact that he had a new Diesel engine and that that evening you told Fuchs that you would get a hull and machinery policy and suggested that Fuchs put his own engineer on the Diesel to be paid by you, then there would be no question of a performance bond.

"The Witness: That's right, Your Honor.

"The Court: That's my recollection of the testimony.

"Mr. O'Brien (petitioner's trial counsel): That's his testimony, yes, as you just said.

"The Court: Yes."

Fuchs confirmed his agreement with Gardner to Mr. Mermelstein (counsel for the Monmouth Park Jockey Club) (Mermelstein, SM pp. 87-91). Conclusive proof that the agreement was completed and that Fuchs considered it complete is the fact that he asked respondent, Gardner, to put his crew and material on board (220-223a; 226a; 306a; 260-261a).

3) Petitioner states that respondent insisted on a written charter party and rejected it when it was presented. This, too, is contrary to the record. There was no agreement to put it in writing, although respondent, Gardner, "assumed" and "expected" it would be (283-284a). But Fuchs never submitted the charter in accordance with the terms agreed upon. He submitted "a form" of a charter on July 8th which he said he would rewrite to incorporate the terms agreed upon, but which he never did (252-253a). This case, therefore, comes squarely within the authorities, cited by the trial court and by the Court of Appeals.

4) Petitioner indulges in criticism of "the conduct of the trial judge." This is unfair and uncalled for. It is not substantiated by the record and no such complaint was made during the trial or to the Court of Appeals. This argument, made solely as an additional vehicle for review, is unworthy of discussion and may be dismissed without further comment.

5) Petitioner urges that there was no completed agreement because there was no commitment by respondent for which he could be held in the event of a violation of the agreement on his part. This, of course, is contrary to the record. It already appears from our resume of the facts that the agreement fully provided for all contingencies; for the acts to be performed by respondent and the consideration to be paid by him for the chartering of the vessel (213a; 218-220a; 229-230a; 267-268a; 313-319a; 263a; 359a). But this was also a matter for the trial court and the Court of Appeals.

It is unnecessary to go further. It completely appears from petitioner's own brief that there is no question involved in this case that merits the attention of this court.

CONCLUSION

The petition for a writ of certiorari should be denied, with interest and costs and damages for delay.

Respectfully submitted,

LOUIS J. MERRELL
Counsel for Libellant-Respondent

SIDNEY M. WITTNER, Esq.
of Counsel